IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6874 OF 2004

1. The Chairman / Secretary,
Janseva Education Society.

2. Shri Vijay V. Mandavkar

3. Shri Dilip G. Davari. .. .. Petitioners

v/s.

1. The State of Maharashtra

2. The Education Officer (Secondary),
Ratnagiri Zilla Parishad,
Ratnagiri.

3. Shri Bhushan M. Palkar. .. .. Respondents

Mr.N.V. Bandivadekar for petitioners.

Mr.R.D. Rane, Addl.Govt.Pleader for res.Nos.1 & 2.

Mr.K.K.Malpathak for res.No.3.

CORAM : H.L. GOKHALE &
S.P. KUKDAY, JJ.

DATE : 8th June 2005

ORAL JUDGMENT : (Per H.L. Gokhale, J.)

1. Heard the learned Counsel for the parties.

2. The 1st petitioner is a Chairman of one Janseva Education Society which is running a secondary school in village Palpene, Taluka Guhagar, District Ratnagiri. One Mahadev Vishram Palkar was employed in the school run by the Society known as Vardan New English School. He

died on 1st May 1997.

3. Petitioner No.2 was working as a Peon in this school from 1987. His appointment is approved in 1989. He made an application for the vacancy arising out of the death of this Mahadev Palkar. However, the 1st Petitioner-Society first gave a letter of appointment as a Peon dated 19th May 1997 to respondent No.3 who is the younger son of the deceased Mahadeo Palkar. Prior thereto, the Society passed a resolution on 18th May 1997 appointing respondent No.3 in the post of a Peon. In paragraph 4 of the present petition, it is specifically averred that the letter of appointment was sent to respondent No.3 on 19th May 1997 but respondent No.3 refused to accept it. The 1st petitioner-Society then proceeded to issue the order in favour of petitioner No.2 promoting him to the post of Junior Clerk. That order was issued on 19th May 1997. Subsequently the vacancy arising out of the promotion of petitioner No.2 to the post of Junior Clerk was filled in on 31st January 2001 by appointing petitioner No.3 as a peon. Incidentally, it may be noted that petitioner No.3 belongs to Nomadic Tribe as can be seen from the approval given by the Zilla Parishad on 2nd July 2001.

4. The appointment of petitioner No.2 to the post of Junior Clerk was approved on 29th December 1997 and that of petitioner No.3 to the post of Peon on 2nd July 2001 by the Education Officer (Secondary), Zilla Parishad, Ratnagiri. Petitioner Nos.2 and 3 have thereafter continued to work in their posts.

5. It appears that respondent No.3 to this petition, who is the younger son of the deceased Mahadeo V. Palkar, approached the Authorities of the Zilla Parishad and the Zilla Parishad thereafter passed the impugned order on 12th August 2004. This order cancelled the approval given earlier. It directed that respondent No.3 be appointed to the post of Junior Clerk. It further directed that petitioner No.2 be demoted to the post of Peon and the services of petitioner No.3 be discontinued. It is this order which is under challenge in the present petition.

6. The matter came up for consideration before a Division Bench on 30th August 2004 and after hearing the petitioner and the learned Additional Government Pleader for respondent Nos.1 and 2, the Division Bench granted an ad-interim

order in terms of prayer (c), whereby this impugned order dated 12th August 2004 was stayed. The Division Bench also directed a notice to respondent No.3 indicating that the petition will be disposed of at the admission stage.

7. Subsequently the petition reached before another Division Bench on 13th April 2005 when that Division Bench raised certain questions with respect to the procedure being followed in the matter of such appointments and whether the same was followed. A further affidavit has been affirmed by the Chairman of the 1st petitioner-Society on 25th April 2005 clarifying the position in this behalf. It is material to note that as far as the Zilla Parishad is concerned, it has filed a reply and to that a rejoinder has been filed by the 1st petitioner-Society. Respondent No.3, who is the contesting respondent, has not chosen to file any reply.

8. Mr.Bandiwadekar, learned Counsel appearing for the petitioners, submitted that the 1st petitioner-Society did offer the post of Peon to respondent No.3, who was the son of the deceased employee. This was in spite of a fact that

respondent No.3 was gainfully employed in the Enron Project and his brother also had a job. The fact, however, remains, as recorded above, that respondent No.3 did not accept the appointment. No affidavit-in-reply has been filed to contest the averments made in the petition that such an offer was made and that he did not accept it.

9. As far as the query by the earlier Division Bench with regard to the advertisement is concerned, Mr.Bandiwadekar has drawn our attention to Rule 9(3) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("M.E.P.S. Rules, 1981", for short), which provides for applications being made for filling in the post of non-teaching staff. It is averred in this further affidavit affirmed on 25th April 2005 that the rule does not specifically prescribe for issuing an advertisement. That apart, he has relied upon the fact that the Zilla Parishad granted the approval to both these appointments on 29th December 1997 and 2nd July 2001, respectively. In this behalf, he has drawn our attention to two Division Bench judgments of this Court, firstly, in the case of **Ashok Shankarrao Shinde vs. Prabodhan Shikshan Sanstha, Nagpur & others** reported in **1999 (1) Maharashtra Law**

Journal page 348 where the Division Bench has held that in case of non-teaching staff possibility of promotion will have to be read in Schedule B to the M.E.P.S. Rules, 1981. Secondly, he has

relied upon a Division Bench judgment of this Court in the case of **Ramesh Shivram Khairnar vs. State of Maharashtra & anr. reported in 2003 (4) Maharashtra Law Journal page 470** where a Peon had applied for the post of Junior Clerk. He had passed S.S.C. examination. The Division Bench held that it was incumbent upon the Management to consider his case rather than issuing an advertisement for the direct recruitment. This Division Bench judgment has relied upon the judgment in the case of **Ashok S. Shinde (supra)**. The Division Bench has also relied upon Rule 12 of the M.E.P.C. Rules 1981. It is with respect to maintenance of seniority of the employees. Schedule F is referred in Rule 12. Item No.3 thereof deals with fixation of seniority and this item dealing with lower grade staff provides as under:-

> " ..... If any of the lower grade staff improves his qualifications as prescribed either for the post of Laboratory

> Assistant or Clerk, such employee should be given preference while filling in the said post according to his place in seniority. "

Mr.Bandiwadekar, therefore, submitted that there was nothing wrong on the part of the 1st petitioner-Society in promoting petitioner No.2 to the post of Junior Clerk when respondent No.3 had declined to accept the post.

10. As far as compassionate appointment is concerned, the law is well settled. It is basically to tide over the difficulties which the family of a deceased employee faces on account of unfortunate death in the family. There is no right that one should get an appointment on a particular post. If at all any authority is required, this position had been clarified by the Apex Court in the case of **Umesh Kumar Nagpal vs. State of Haryana & ors. reported in (1994) 4 Supreme Court Cases page 138**.

11. In the circumstances, Mr.Bandiwadekar submits that when these two persons have worked from 1997 and 2001 onwards, there was no reason for the Education Officer to entertain the

complaint in the year 2004 and to pass the impugned order.

12. Mr.Rane, learned Additional Government Pleader appearing for the Zilla Parishad, submitted that the 1st petitioner-Management ought to have entertained the application of respondent No.3 for the clerical post. The father of respondent No.3 was working as a Clerk and in the vacancy arising from his death, the case of respondent No.3 ought to have been considered on the compassionate ground.

13. Mr.Malpathak, learned Counsel appearing for respondent No.3, submitted that the advertisement was necessary and he referred us to the procedure of approval to the appointment of teaching and non-teaching staff by the State Government vide G.R. dated 19th June 1995. He referred to Clause 7(a) thereof which states that whichever post is to be filled in, the same should be advertised.

14. We have noted the submissions of all the Counsel. The position in law is very clear that in the event of death in the family of an employee, the vacancy arising from his death, can

be filled on a compassionate ground. However, there is no right that somebody in family ought to be employed. That apart, the appointment is to be made to tide over the difficulties and, therefore, if the deceased employee was Clerk, there is no right to a family member that the person to be appointed must be appointed in that category only. In the present case, respondent No.3 was offered a Peon's post. He did not accept it. Thereafter petitioner No.2 was appointed in the year 1997 and petitioner No.3 in 2001. The approval was granted to both these appointments. The appointment of petitioner No.1 was approved on 29th December 1997 and that of petitioner No.3 on 2nd July 2001 by the Zilla Parishad. Both these appointments and the approvals were not challenged by respondent No.3 at any point of time. He chose to lodge the complaint much later which came to be entertained in 2004.

15. Prima facie, we find that there is no basis to this complaint being entertained. Even with respect to the reliance on the G.R. that an advertisement ought to be given, we quite see that it is the normal procedure. However, as recorded by the Division Bench in the case of **Ramesh Khairnar** (supra), there is a provision for quality

improvement for the subordinate staff included in Rule 12 read with Schedule F, Item No.3 of the M.E.P.S. Rules, 1981. That being a special provision, the provision made in the rule will have to be read as applicable and governing the situation when an eligible subordinate employee is available for the promotional post. Obviously, in such a case, an advertisement cannot be insisted upon.

16. In the circumstances, we find that the impugned order dated 12th August 2004 passed by respondent No.2-Education Officer (Secondary), Ratnagiri Zilla Parishad, Ratnagiri, is erroneous and unjustified and the same is, therefore, set aside. The petition is allowed in terms of prayer clause (b). However, there will be no order as to costs.

(H.L. GOKHALE, J.)

(S.P. KUKDAY, J.)